Supreme Court, U.S.
FILED
FEB 17 2010
OFFICE OF THE CLERK

No. 09-640

In the Supreme Court of the United States

VICTOR WILLIAM MOLINA-DE LA VILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of exclusion, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies such as crimes of violence. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is:

Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of a crime of violence after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Mukasey*, 128 S. Ct. 2961 (2008) 7
Armendariz-Montoya v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003) 6, 7, 15
Atkinson v. *Attorney Gen.*, 479 F.3d 222 (3d Cir. 2007) 10, 12, 13, 16
Canto v. *Holder*, No. 08-4272, 2010 WL 308795 (7th Cir. Jan. 28, 2010) 13, 15
Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002) 11
Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 7
Dias v. *INS*, 311 F.3d 456 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003) 10
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) .. 6, 9, 10
Ferguson v. *United States Att'y Gen.*, 563 F.3d 1254 (11th Cir. 2009), petition for cert. pending, No. 09-263 (filed Sept. 30, 2009) 10
Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 10, 16
Hernandez-Castillo v. *Gonzales*, 549 U.S. 810 (2006) 7
Hernandez-Castillo v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 549 U.S. 810 (2006) 10

Cases—Continued: Page

Hernandez de Anderson v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007) 6, 10, 16
INS v. *St. Cyr*, 533 U.S. 289 (2001) ..... *passim*
Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 11
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000) 15
Kellermann v. *Holder*, No. 08-3927, 2010 WL 252264 (6th Cir. Jan. 25, 2010) 10
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 15
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 8, 9
Lawrence v. *Ashcroft*, 540 U.S. 910 (2003) 7
Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 11, 16
Martin v. *Hadix*, 527 U.S. 343 (1999) 8, 10
Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 10, 11
Olatunji v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) 11
Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) 11, 12, 15
Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 10, 15
Reyes v. *McElroy*, 543 U.S. 1057 (2005) 7
Saravia-Paguada v. *Gonzales*, 488 F.3d 1122 (9th Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008) 6
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976) 2
St. Cyr v. *INS*, 229 F.3d 406 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001) 15
Stephens v. *Ashcroft*, 543 U.S. 1124 (2005) 7
Thom v. *Gonzales*, 546 U.S. 828 (2005) 7

Cases—Continued: Page

United States v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008) 10
Wood v. *Allen*, No. 08-9156 (Jan. 20, 2010) 11
Zamora v. *Mukasey*, 128 S. Ct. 2051 (2008) 7

Statutes, regulation and rule:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 ..... 2, 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 304(b), 110 Stat. 3009-597 2
§ 321(b), 110 Stat. 3009-628 13
§ 321(c), 110 Stat. 3009-628 13
Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(F) 3
8 U.S.C. 1182(a)(2)(A)(i)(I) 5
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1229b (§ 240A) 3
8 U.S.C. 1229b(a)(3) 3
8 C.F.R. 1212.3(h) 4
Sup. Ct. R. 14.1(a) 11

Miscellaneous: Page

Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf> 17

54 Fed. Reg. 47,586 (1989) 18

Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 3

p. 57,828 4

In the Supreme Court of the United States

No. 09-640

VICTOR WILLIAM MOLINA-DE LA VILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-8a) is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 389. The decisions of the Board of Immigration Appeals (Pet. App. 9a-12a) and the immigration judge (Pet. App. 13a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. A petition for rehearing was denied on June 4, 2009 (Pet. App. 1a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to November 1, 2009, and the petition

was filed on November 2, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion.[1]

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001). In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110

---

[1] While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as applying to both exclusion and deportation proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (citing *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976)). As petitioner notes (Pet. 2 n.1), this case involves the current equivalent of exclusion proceedings, because he was arrested at the border and charged with being inadmissible.

Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a crime of violence that results in a prison sentence of at least a year). See 8 U.S.C. 1101(a)(43)(F), 1229b(a)(3).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under former Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agree-

ments." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. a. Petitioner is a native and citizen of Colombia. Pet. App. 13a. He obtained status as a lawful permanent resident of the United States in 1980 as a result of his having married a U.S. citizen in 1977. *Id.* at 21a, 23a. He filed an application to become a naturalized citizen but failed to complete the statutory process of naturalization. *Id.* at 21a-22a. He therefore remains an alien and is subject to removal under the INA. *Id.* at 22a.

In August 1989, petitioner approached a woman he did not know, who was walking with her two-year-old son to mail a bill and then attend a prayer service at her church. Without asking her permission, he drove alongside her and began taking photographs of her and her son. He got out of his car, jumped in front of her, and took more photographs. He asked whether he could take a picture of her son. She ignored him and proceeded to a mailbox. Administrative Record 1049 (A.R.).

When the woman returned from mailing the bill, petitioner again drove alongside her and her child and asked if he could buy them something. She declined. As she headed towards the church entrance, petitioner again got out of his car and ran up to her. With both hands, he pulled her pants down with a force sufficient to rip open the waistband seam and injure her neck. Petitioner said he intended to rape her and force her to have oral sex. She screamed, hit him, and broke free. Still carrying her two-year-old son, she was able to make it to the church entrance. A.R. 1049-1050.

Petitioner was arrested and charged under California law with assault with intent to commit rape. A.R.

1066. He pleaded not guilty, but at a jury trial in the California Superior Court for the County of Los Angeles, he was found guilty as charged. Pet. App. 15a; A.R. 1034, 1045.

In February 1990, the court sentenced petitioner to the maximum term of six years in prison, which was suspended on the condition that he serve one year in the county jail. A.R. 1027-1028. He appealed, challenging his sentence, but in December 1991 the California Court of Appeal for the Second Appellate District affirmed the judgment. A.R. 1048-1051.

b. After serving his felony sentence, petitioner visited his native Colombia on three separate occasions—in December 1998, March 2002, and November 2002. Pet. App. 21a. After the first two trips, immigration officers at the U.S. border did not question his admissibility. But in December 2002, upon his return to the United States from Bogota, he was detained by immigration inspectors because of his felony conviction. *Id.* at 13a-14a. As a result of the conviction, he was placed in removal proceedings and charged with being inadmissible (*i.e.*, removable), under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an arriving alien who has been convicted of a crime involving moral turpitude. A.R. 1186-1188.

After a hearing, an immigration judge (IJ) found petitioner to be removable as charged. A.R. 293, 350. Petitioner sought a number of forms of relief or protection from removal, among them a waiver of inadmissibility under former Section 212(c). A.R. 1076-1082.

The IJ concluded that petitioner was not eligible for relief under former Section 212(c) because, unlike the alien in *St. Cyr*, petitioner did not enter into a guilty plea, and his conviction resulted from a jury verdict. Pet. App. 19a-20a; A.R. 413-414. After concluding that

petitioner was not eligible for any other relief from removal, the IJ ordered him removed to Colombia. Pet. App. 35a.

c. Petitioner appealed that ruling to the Board of Immigration Appeals (Board). A.R. 216-220. Adopting and affirming the IJ's ruling, the Board dismissed the appeal. Pet. App. 11a-12a. It concluded that petitioner was not eligible for a waiver of inadmissibility under former Section 212(c) because he had been convicted of a crime of violence after trial rather than a guilty plea. *Ibid.* (citing *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003)).

3. The court of appeals denied a petition for review in a brief, unpublished, per curiam opinion. Pet. App. 2a-8a. The court explained that petitioner had not relied on the existence of a potential waiver under Section 212(c) but, rather, "passively relied upon the fact that conviction for his crime did not result in deportation at the time." *Id.* at 7a. Moreover, the court distinguished petitioner's case from those in which there is some "affirmative post-conviction reliance" on former Section 212(c). *Id.* at 6a (discussing *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007)). The court concluded that, because petitioner took no action that enhanced the significance of Section 212(c) relief to him in particular, "he cannot claim to have reasonably relied on it." *Id.* at 7a (citing *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1134 (9th Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008), and *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 n.10 (2006)).

The court of appeals, with no judge having requested a poll, denied a petition for rehearing en banc. Pet. App. 1a.

ARGUMENT

Petitioner contends that the Court should grant review to consider the applicability of Congress's 1996 repeal of Section 212(c) of the INA in the case of aliens who did not plead guilty to pre-1996 offenses that render them removable. The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Moreover, although petitioner claims he relied on the availability of Section 212(c) relief when he chose to go to trial, he has not explained how that prospect affected his decision. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 13 years ago, and this Court has denied petitions urging a similar extension of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in a number of prior cases. See, *e.g.*, *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).[2]

---

[2] A similar question is presented in *Ferguson* v. *Holder*, petition for cert. pending, No. 09-263 (filed Sept. 30, 2009).

1. Petitioner argues (Pet. 30) that the decision below conflicts with this Court's retroactivity analysis, and that the court of appeals should not have treated the prospect of reliance as having "dispositive weight" in the retroactivity analysis. That objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

That focus on reliance was consistent with the Court's prior cases. In *Landgraf*, the Court specifically

identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270. See also *St. Cyr*, 533 U.S. at 321 (quoting same). Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Landgraf*, 511 U.S. at 269-270 (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for [Section] 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particu-

lar, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

2. Petitioner contends (Pet. 13-30) that this case offers a suitable vehicle to resolve a conflict among the circuits as to the continued availability of relief under former Section 212(c) to aliens who were convicted of crimes before the enactment of AEDPA and IIRIRA.

The disagreement in the analysis of the circuits, however, is narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, No. 08-3927, 2010 WL 252264, at *5-*7 (6th Cir. Jan. 25, 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), petition for cert. pending, No. 09-263 (filed Sept. 30, 2009). Two circuits have held that no showing concerning reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231

(3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).[3]

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens

---

[3] Petitioner cites (Pet. 20) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting a reliance requirement for retroactivity analysis. The retroactivity issue in *Olatunji*, however, involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). As petitioner acknowledges (Pet. 20), even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument on the merits—continued to hold that "IIRIRA's repeal of [Section] 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

Petitioner suggests in passing (Pet. 26 n.13) that this case could be used as a vehicle to decide the retroactivity question at issue in *Olatunji*, about the use of removal proceedings when permanent residents return from trips abroad. But that question is not fairly included in the question presented by the petition, which addresses only the repeal of Section 212(c). Pet. i; see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Wood* v. *Allen*, No. 08-9156 (Jan. 20, 2010), slip op. 13 (refusing to address an issue discussed in a petition for certiorari because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review") (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)).

who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that pro-

vided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. Petitioner, by contrast, was convicted prior to the 1990 amendment. See Pet. App. 15a; Pet. 6 n.3. At that time, a criminal conviction was not disqualifying under Section 212(c) regardless of the length of the sentence served. Indeed, petitioner's conviction did not even render him deportable until IIRIRA later classified it as an aggravated felony, in a provision that petitioner "does not dispute" applies retroactively. Pet. 7 n.4; see IIRIRA § 321(b) and (c), 110 Stat. 3009-628. As a result, preserving eligibility for relief under Section 212(c) could not reasonably have been expected to play a role in an alien's strategic decisions in such a criminal prosecution.

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on reliance. No circuit has denied that a determination of retroactive effect *may* be based on reliance. As the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto* v. *Holder*, No. 08-4272, 2010 WL 308795, at *5 (Jan. 28, 2010).

3. In the alternative, petitioner claims (Pet. 32-33) that, even if reliance is a significant factor in evaluating retroactive effect, he reasonably relied on the continued availability of Section 212(c) relief in making his decision to go to trial rather than plead guilty. That argument is unpersuasive.

The petition suggests that reliance in these circumstances is established because the decision "whether or not to go to trial" is "the same decision as the one at issue in *St. Cyr*." Pet. 32 (emphasis omitted). But someone does not necessarily rely on the same things in making one choice (to plead guilty) rather than the other (to go to trial). In *St. Cyr*, the alien gave up the chance to prove his innocence at a trial in reliance upon the potential that Section 212(c) relief—which would remain available if he received a sentence of five years or less—would mitigate the effects of the resulting conviction, which included rendering him deportable. Here, by contrast, petitioner did not forgo anything in choosing to go to trial rather than plead guilty. At the hearing before the IJ, petitioner's attorney explained that petitioner could testify "that he had offered to plead [guilty] to simple assault, but the District Attorney would not accept that plea," and that, rather than "trying to plea[d] to a higher offense in hopes of getting a lower sentence," petitioner chose "to go forward at trial in the hopes that he could prove his innocence, but also with the knowledge that under the law, at the time in early 1990, he would have qualified for a [*sic*] 212(c) relief." A.R. 407. According to that proffer, petitioner did not, for example, forgo an opportunity to plead guilty to a lesser offense. Instead, his attempt to plead guilty to a lesser offense was rebuffed. Thus, unlike the alien in *St. Cyr*, petitioner still has not explained how, by going to trial on the greater offense of assault with intent to commit rape, he gave up anything in reliance on the prospect of Section 212(c) relief.

As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contem-

plated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto*, 2010 WL 308785, at *6. And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences to *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not protected against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that does not bar relief, or the continued availability of relief at all. See *Ponnapula*, 373 F.3d at 495-496 & n.14; *Rankine*, 319 F.3d at 101-102; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190 F.3d at 1150, and *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances in fact are quite distinct from those of aliens on whom Section 212(c)'s repeal was held to have a retroactive effect by virtue of the prospect of reasonable reliance based on some action other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* took the affirmative step of bringing "herself—and her criminal convictions —to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. 497 F.3d at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for [Section] 212(c) relief" after 1990. 458 F.3d at 1199.[4]

Petitioner, by contrast, has identified no affirmative act that he committed in possible reliance on the availability of Section 212(c) before its repeal. His decision to go to trial rather than plead guilty could not have been intended to reduce the risk of a sentence that would bar relief under Section 212(c), because the five-year-imprisonment ceiling was not added to Section 212(c) until several months after his conviction, and his conviction did not even render him deportable in the first instance until IIRIRA was enacted. See p. 13, *supra*. Nor, according to the terms of his proffer, was his decision to go to trial made with the intention of avoid-

[4] The aliens in *Atkinson* and *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See p. 12, *supra*; *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

ing exposure to a potential conviction for a greater offense. A.R. 407. Petitioner thus has pointed to no act or transaction that raises even the prospect of reasonable reliance.

4. Finally, petitioner also cannot avoid the fact that the question he presents involves the retroactive effect of a statutory repeal that occurred more than 13 years ago.

Petitioner cites (Pet. 22-23) statistics about the frequency with which Section 212(c) relief has been granted in the last several years. That number declined from 1905 grants in FY 2004 to 1049 grants in FY 2008. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. Although the *Statistical Year Book* for FY 2009 has not yet been published, the corresponding number for FY 2009 is expected to be 858 grants—reflecting a 55% decline since FY 2004. Similarly, according to other unpublished statistics compiled by the Executive Office of Immigration Review, the number of applications for Section 212(c) relief has fallen dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008. Moreover, because most criminal defendants plead guilty, the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial would be only a small fraction of those numbers.

Petitioner also suggests (Pet. 23-24) that new cases will continue to arise when aliens with old convictions travel abroad, apply for status changes, renew their permanent residency or "green" cards, or are arrested in

worksite raids. Yet, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions have already been exposed to immigration authorities at some point since 2000—which further shrinks the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

FEBRUARY 2010